

Four Good Things About Wechsler's Approach

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Anders Walker's account of criminal law pedagogy is fascinating and tantalizing.¹ I am particularly interested in speculating on the consequences of Herbert Wechsler's path-breaking text. What developments might we attribute to his shift from a purely case-oriented treatment of criminal law to one that views law as a social construction to be evaluated from normative and utilitarian perspectives?

From my own vantage point of having learned criminal law from a second-generation Wechslerian text,² and having engaged in criminal practice before entering academia to teach criminal law and criminal procedure and eventually becoming a dean, four happy developments came to mind as I read Walker's manuscript. In this brief essay, I will touch on these in the order in which they occurred to me, rather than in their order of importance.

First, it seems likely that Wechsler's innovation has contributed to higher education's tolerance of law as a graduate school discipline. Second, Wechsler's method has enhanced the power of the practicing bar by producing lawyers (and judges) who occupy the center of the lawmaking world. Third, among American lawyers, it facilitates a critical perspective and adeptness that surely must serve them well in a global economy. Finally, it has attracted to the profession a constant and diverse stream of idealistic talent that believes it can use the law to make the world a better place. There undoubtedly are other, less fortunate, consequences of the approach Wechsler pioneered,³ but on balance, I think it has been felicitous.

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¹ Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217 (2009).

² I had the pleasure of taking criminal law from Dan Polsby, now dean at George Mason, who at the time (fall 1982) used what we then called "Kadish & Paulsen," now SANFORD H. KADISH ET AL., *CRIMINAL LAW & ITS PROCESSES: CASES & MATERIALS* (8th ed. 2007). I don't know whether it was the professor or the book or both, but I entered my first semester of law school thinking I would go into tax, and I came out the other end knowing that criminal defense was the place for me. If part of Wechsler's purpose was to dissuade students from pursuing criminal practice, it was thwarted in my case and probably that of many others. The Wechsler approach makes criminal law just too darn interesting to leave to lawyers of "inferior social position"! And, as for the claim that Wechslerian criminal law texts do not teach "the law" or prepare students for criminal practice—well, his approach certainly lays a solid groundwork, by emphasizing sufficient fundamentals (general principles, statutory construction, and historical context) to enable most law school graduates to pick up a criminal code and make immediate sense of it. This is more than I can say for some other law school courses.

³ Chief among these is a lack of rigor in dealing with the social sciences and other disciplines. Undoubtedly the growing pool of law professors holding both JDs and terminal degrees

I. LAW AS A GRADUATE SCHOOL DISCIPLINE

The past few decades have seen legal education slide toward the graduate school side of higher education's continuum,⁴ perhaps aided by research opportunities growing out of both Wechsler's enlarged approach to legal pedagogy, and the related project of evaluating law from a critical perspective. For lawyers, law professors, and law schools, this has been a good thing generally, in terms of the greater academic prestige that has accompanied it. But from my point of view as a dean of a law school embedded within a research university, it has been more than just a good thing. For my law school and others in its category, which were viewed within their institutions as providing a kind of academic extension service, it has meant a seat at the grownups' table—an essential position when the pie is passed around. Within research universities, PhDs hold most of the leadership positions, and when law deans make a case for resources, it helps immensely that legal scholarship has gained credibility, cross-disciplinary respect, and allies from other university departments.⁵

In addition, Wechsler's act of borrowing from social sciences, philosophy, and other areas has grown to encompass opportunities for inter-disciplinary teaching and research in law schools, bringing about much richer experiences for students and faculty. These experiences may not have been possible without the transformation he engendered. For example, most research university law schools offer joint degree programs that permit JD candidates to earn Master's degrees in other disciplines in relatively little time.⁶ These programs generally depend on acceptance, by the other discipline, of law as a truly academic—and not just trade school—pursuit to which they will award credit. The inclusion of themes, vocabulary, research agendas, and source materials from these other disciplines helps convince them that law really is an academic graduate-level study.⁷

in other disciplines will raise the quality of cross-disciplinary legal pedagogy and research, but that development may have its own negative consequence—a smaller pool of law professors who have actually practiced law.

⁴ See WILLIAM M. SULLIVAN ET AL., *CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4* (2007).

⁵ It also helps that law school faculty are good at figuring out solutions to governance issues by bringing to bear their Wechslerian training as “hypothetical legislators.” And it helps that law schools produce alumni whose professional careers garner social and political power. These are attributable to Wechsler in some degree, as I'll point out below.

⁶ The availability of such interdisciplinary opportunities for research at university law schools has provided them with a competitive advantage vis-à-vis their independent peers, although one that perhaps only evens the score after factoring in the agility-advantage held by independents.

⁷ The acceptance of law as a graduate school discipline, however, remains tenuous. Just this year, my own school had to go to great lengths to convince a sister research university that law courses should be considered “graduate level” ones for purposes of a joint degree program.

II. JUDGES AND LAWYERS AS LAWMAKERS

As Walker points out, one of Wechsler's contributions was that he embraced the perspective of the "hypothetical legislator."⁸ Given the rise of public law in the twentieth century, and its constant manipulation for social, political, and ideological purposes, there is a lot of lawmaking going on. Who better to engage in this task than lawyers trained to bring to bear on the law a critical eye, to assess its place in culture and society, and to evaluate its effectiveness as a tool for social change? Wechsler's hypothetical legislator has become the lawyer-legislator,⁹ and, ironically (given his disdain for judicial lawmaking), the judge-legislator who initiates drug court programs,¹⁰ engages in research about the effectiveness of particular sanctions,¹¹ and oversees complex public workouts such as school desegregation and prison overcrowding. Without Wechsler, the intellectual component of policy-making, lawmaking, and law reform might have been left in the hands of academics, rather than the practicing profession. Whether this is a good thing or not, it certainly has heaped power and prestige upon the legal profession. For example, when President Obama chose his team, lawyers were chief among them—the *Washington Post* observed in a headline that ran shortly after his inauguration: "Obama Stocks White House with Prominent Lawyers."¹²

III. AMERICAN LAWYERS IN A GLOBAL WORLD

I suspect that American lawyers are far better situated with Wechsler than without him to contribute to a world in which national economies, social contexts, legal systems, and political arrangements are increasingly interdependent. Particularly given the late arrival of comparative and international law to American

⁸ Walker, *supra* note 1, at 244.

⁹ Recent data, though, suggests that the number of lawyer-legislators is declining. Jeffrey W. Stempel, *Lawyers, Democracy and Dispute Resolution: The Declining Influence of Lawyer-Statesmen Politicians and Lawyerly Values*, 5 NEV. L.J. 479, 484 (2004) ("For example, during the 1960s and 1970s, more than two-thirds of United States Senators (between sixty-five percent and sixty-eight percent, depending on the Congress) were lawyers. During the 1980s, this figure dipped, a trend that continued into the 21st Century. In the 107th Congress (2001), barely half of the Senators were lawyers." (citing NORMAN J. ORNSTEIN ET. AL., VITAL STATISTICS ON CONGRESS 2001-2002, 46 (2002)).

¹⁰ For example, Oregon trial court Judge Richard Baldwin created the second drug court in the country. See Gary Whitehouse, *A Day in the Life: Drug Court in Oregon* (May 2004), <http://www.oregon.gov/DHS/news/staff/features/04drugcourts.html>. The movement is a national one; its proponents and implementers are judges.

¹¹ For an example, see Judge Michael Marcus's webpage at <http://www.smartsentencing.info/whatwrks.html>. Marcus is a Multnomah County (Oregon) trial court judge who is, in his words, "determined to aim the sentencing process at crime reduction through evidence-based sentencing." Michael Marcus, *Smart Sentencing: Sentencing for Public Safety and Harm Reduction*, <http://www.smartsentencing.info/whatwrks.html> (last visited Sept. 4, 2009).

¹² Dan Eggen, *Obama Stocks White House with Prominent Lawyers*, WASH. POST, Jan. 30, 2009, at A3.

legal education, Wechsler's habit of roaming the disciplines and the world's legal systems for snippets of useful information has stood alone in exposing generations of American lawyers to law's situation as a contingent creation of culture and society. This habit of mind surely contributes to a capacity to work ably with other legal cultures. Harvard Professor Fernando Reimers speaks of "global competency" as involving, among other things, "a positive approach toward cultural differences, . . . a willingness to engage those differences, . . . and a capacity to think critically and creatively about complex international challenges . . ." ¹³ The lawyer trained with a Wechsler text has embarked on this aspect of global competency; the law student studying only within a "closed system" has not.

IV. THE LEGAL PROFESSION AS AN ATTRACTIVE CAREER

American law schools would be poorer in student talent if the profession had remained primarily a handmaiden for private interests. Instead, our schools are full of students who perceive in the legal profession its capacity for effecting change. Not surprisingly, this group is more diverse in terms of race, ethnicity, gender, and class than many others in higher education, for it is in law that these students feel they will be able to incorporate their experiences and perspectives into a meaningful professional life. They respond with special enthusiasm to first-semester Criminal Law, with its text that challenges the efficacy and even the intentions of existing legal norms and introduces a framework for social engineering. This is the stuff for which they came to law school.

Thank you, Herbert Wechsler!

¹³ Fernando Reimers, Commentary, *'Global Competency' Is Imperative for Global Success*, CHRON. HIGHER EDUC., Jan. 30, 2009, at A29.